CANADIAN HUMAN RIGHTS TRIBUNAL

ANNUAL REPORT 2008

Ensuring equal access to the opportunities of Canadian society through efficient, fair and equitable adjudication

160 Elgin Street, 11th floor, Ottawa, Ontario K1A 1J4
Tel: 613-995-1707 | Fax: 613-995-3484 | TTY: 613-947-1070 | E-mail: registrar@chrt-tcdp.gc.ca

WWW.CHRT-TCDP.GC.CA

Canada

Cat. no. HR61-2008
ISBN 978-0-662-06489-3

Canadian Human Rights Tribunal/Annual Report 2008

Message from the Chairperson

The human rights landscape in Canada has changed considerably since the *Canadian Human Rights Act* first came into effect in 1978. The 1998 amendments to the *Act* severed long-standing institutional ties between the Tribunal and the Canadian Human Rights Commission, launching the Tribunal on a path to greater independence and impartiality.

Because the experience of discrimination goes to the very core of who we are, every decision that refines the interpretation of the *Canadian Human Rights Act*—that clarifies what, exactly, discrimination is or isn't—brings us a little closer to the Act's ideals of social justice and inclusiveness. Over the past three decades, Tribunal decisions have provided definitive illustrations of what constitutes sexual harassment, helped diversify the federally regulated workplace, guided employers in accommodating people with disabilities, and fostered awareness in society as a whole of the systemic and often unintentional nature of discrimination and the desirability of proactive, results-based solutions. In ordering remedies, the Tribunal has sought to create a climate in which negative practices and negative attitudes can be challenged and discouraged.

It is easier to look back and recognize outdated norms such as sexual stereotyping than it is to spot the discrimination inherent in contemporary norms. In 2006, the Tribunal recognized the discriminatory impact of the screening criterion of "overqualified" on visible minority immigrants. In a society that does not accept the foreign credentials of many visible minority immigrants, highly qualified newcomers to Canada are often forced to seek employment in less skilled jobs; such applicants are disproportionately overqualified.

Over the next few years the Tribunal expects to see an increase in age discrimination cases as mandatory retirement comes under attack by a wave of still capable baby boomers. Also, the repeal of section 67 of the *Canadian Human Rights Act* will change how First Nation governments and public authorities, who were previously somewhat shielded from the Act's scrutiny, reflect Canadian human rights norms in their employment and service delivery policies and practices. But there is a three-year grace period before the new liability regime comes into force. The current legislation maintains the *status quo* during the three-year interim.

Another development to watch is the recent constitutional challenge to section 13 of the *Canadian Human Rights Act*, which prohibits telecommunications or Internet messages that are likely to promote hatred or contempt of individuals based on prohibited grounds of discrimination. This provision has been a focus of concern of civil libertarians and others who assert that in all cases, freedom of expression should prevail over freedom from group defamation.

Of course, not every human rights complaint generates new case law. The Tribunal's reinstatement in 2003 of its mediation process has meant that many complaints are resolved without need for a formal hearing. More than 40 percent of cases referred to the Tribunal proceed first to mediation, and 70 percent of these reach a mediated settlement. Many such settlements include clauses committing respondents to create or revise institutional policies on discrimination. Mediation also affords the parties the opportunity to share a common understanding and to move on with their lives.

J. Grant Sinclair
Chairperson

Who We Are and What We Do

The Canadian Human Rights Tribunal (CHRT) is a quasi-judicial body mandated by statute to inquire into complaints of discrimination referred to it by the Canadian Human Rights Commission. The Tribunal hears complaints and decides whether the activity complained of is a discriminatory practice under the *Canadian Human Rights Act*. The Act prohibits discrimination on the basis of race, national or ethnic origin, colour, religion, age, sex (including pregnancy), marital status, family status, sexual orientation, disability (including drug dependency) or pardoned criminal conviction. Maintaining wage differences between male and female workers performing work of equal value in the same establishment is also prohibited by the Act.

The *Canadian Human Rights Act* applies only to federally regulated employers and service providers, such as federal government departments and agencies, federal Crown corporations, chartered banks, airlines, shipping and inter-provincial trucking companies, and telecommunications and broadcasting organizations. The Act also prohibits telecommunications and Internet messages that are likely to expose people to hatred or contempt because of their race, ethnic origin, sexual orientation or other prohibited ground of discrimination.

The Tribunal also has the authority to hear complaints under the *Employment Equity Act*, which applies to federal government employees and to federally regulated private sector employers with more than 100 employees.

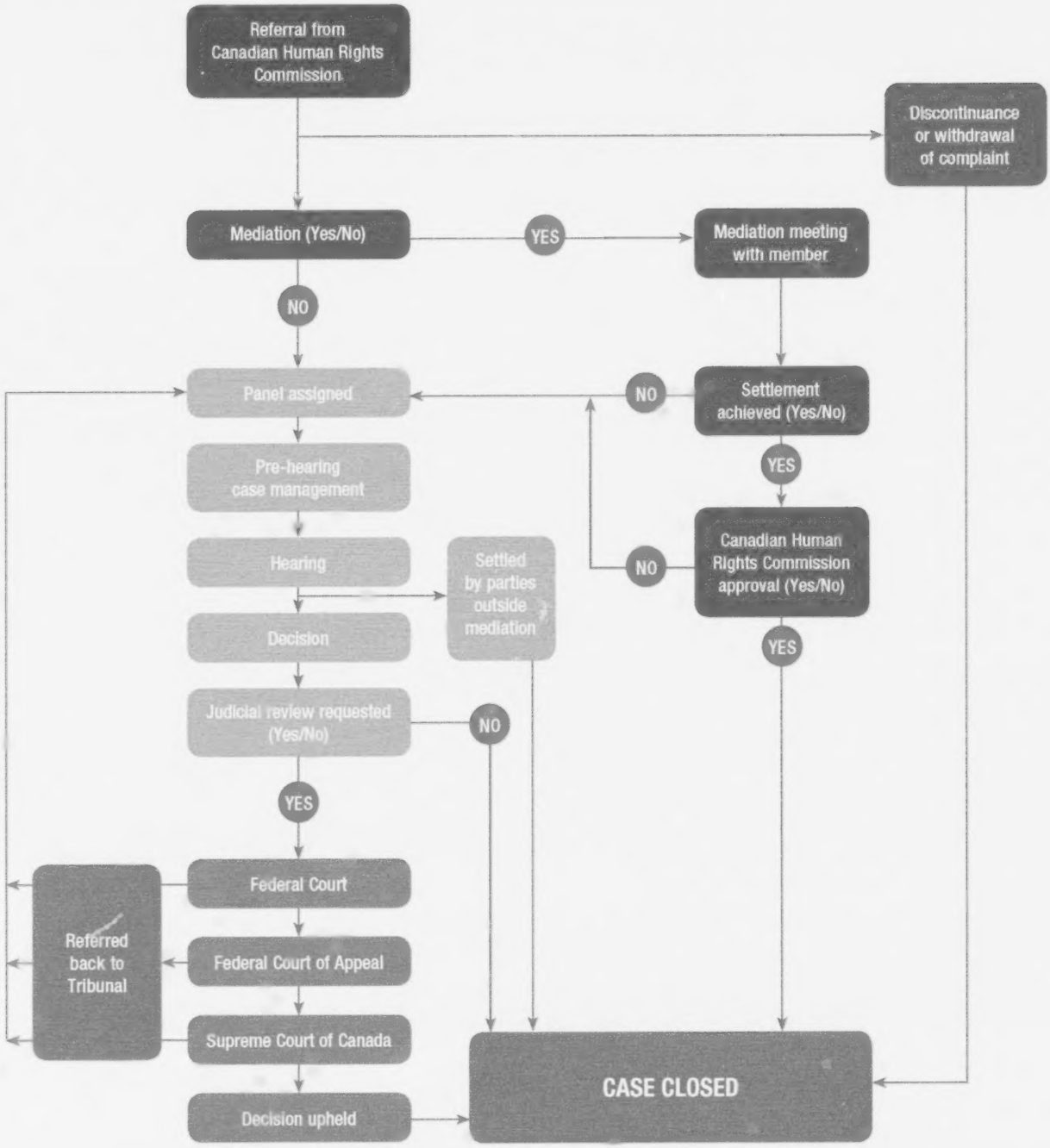
Tribunal performance reports
www.chrt-tcdp.gc.ca/about/performance_e.asp

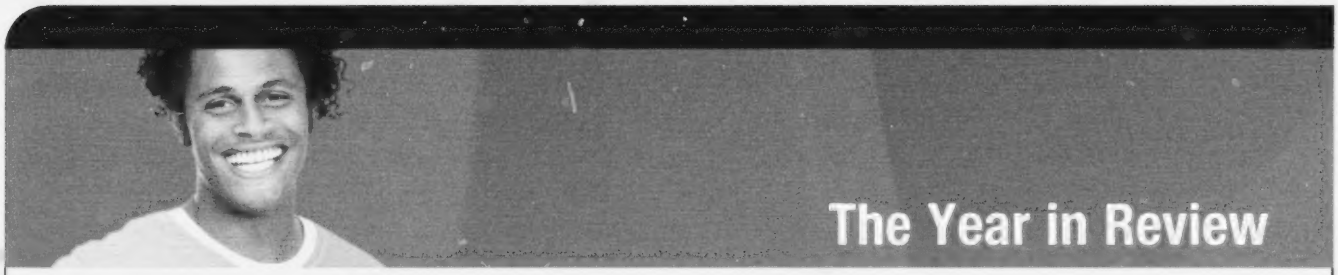
Like a court, the Tribunal is strictly impartial. *Unlike* a court, the Tribunal provides an informal setting where the parties can present their cases without legal representation and without adhering to strict rules of evidence. Parties call witnesses or testify on their own behalf, and witnesses are subject to cross-examination. Documentary evidence can also be adduced. At the end of the hearing, final arguments are made. Tribunal members are seasoned human rights adjudicators. They are also experienced mediators. If complainant and respondent are willing, a Tribunal member is assigned to help them achieve a mediated settlement. Otherwise, or if mediation fails, a Tribunal member hears the complaint and renders a written decision. The parties may elect to settle the complaint at any time before the Tribunal renders its decision. Tribunal decisions are subject to review by the Federal Court at the request of any of the parties.

Administrative responsibility for the Tribunal rests with the Registry, which plans and arranges hearings and provides liaison between the parties and Tribunal members. The Registry is also responsible for managing the operating resources allocated to the Tribunal by Parliament. Details of Registry activities, including recent developments in comptrollership, management accountability and public administration, can be found in the Tribunal's performance reports.

Figure 1 illustrates how the Tribunal resolves complaints.

Figure 1: How the Tribunal Works





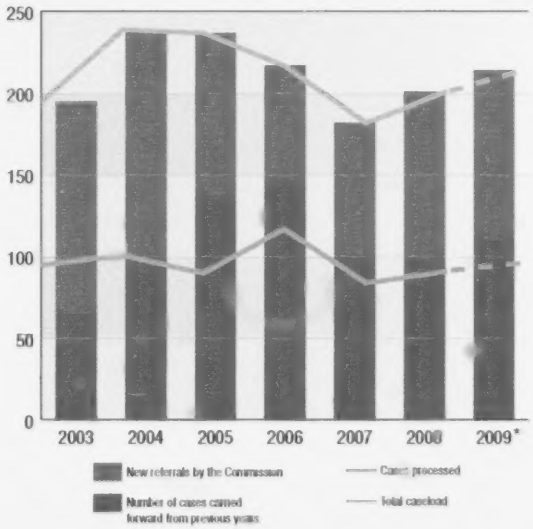
The Year in Review

The Tribunal had a busy year in 2008. The Canadian Human Rights Commission referred 103 new complaints for inquiry, up 25 percent from 2007. As the Tribunal carried forward 98 active case files from earlier years, its total caseload for the year was significant — 201 cases in all — down slightly from the previous five-year average of 214 cases, but up about 10 percent from 2007. See Figure 2, below.

Tribunal members conducted 57 mediations, presided over hearings into 19 complaints, and issued 17 decisions and 33 rulings on motions, objections or other preliminary matters. At the end of 2008, 110 cases remained active, including 22 from earlier years.

Although annual complaint referrals peaked at 139 in 2004, Figure 2 illustrates how this spike has continued to influence the Tribunal's caseload. For example, new referrals dropped by close to 50 percent between 2004 and 2006, but the Tribunal's 2006 caseload declined by less than 10 percent compared with 2004.

Figure 2: Tribunal Case Files Opened and Carried Forward, 2003 to 2009



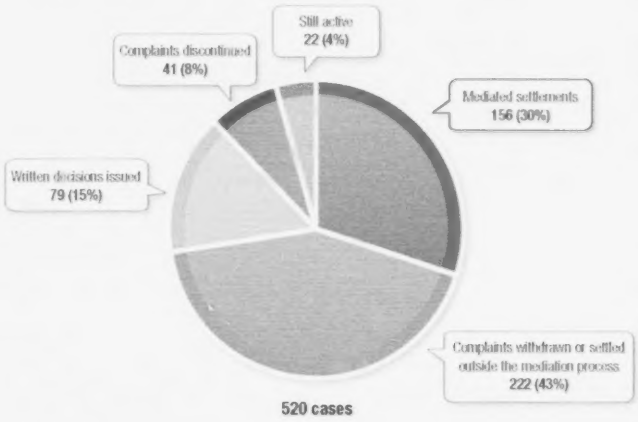
* New referrals and number of cases processed for 2009 are estimates based on information received from the Canadian Human Rights Commission and on the mean of the previous years.

Thanks to various process improvements introduced in the last few years, and the general decline in new referrals between 2004 and 2007, the Tribunal cleared all pre-2005 cases by the end of 2008, as well as more than 90 percent of cases referred from 2005 through 2007.

The reinstatement of the Tribunal's mediation process in 2003 has also been a major contributor to the expeditious processing of complaints. Mediation sessions are easy to arrange, usually take only one day to complete, and result in settlements about 70 percent of the time. Therefore, even though parties opt for mediation in generally only about 40 percent of cases, the revival of mediation has served to optimize the use of the Tribunal's limited resources, as well as those of the parties.

Figure 3 illustrates how the Tribunal processed the 520 cases referred by the Commission from 2003 to 2007, inclusive.

Figure 3: Status of cases referred from 2003 to 2007, inclusive, as of December 31, 2008



Cases referred in 2008 remain mostly in progress and have therefore not been included in the pie chart as the result would be misleading. Of the 103 cases referred by the Commission in 2008, written decisions were rendered in 3 and mediation was attempted in 57, with mediated settlements reached in 38 cases. It is likely that all outstanding 2008 cases will be mediated or adjudicated in 2009.

Mediations

As well as expediting the disposition of cases, mediation offers other benefits, not least of which is a harmonious outcome. Parties have an opportunity to actively participate in the resolution of their dispute and to fashion a creative remedy not otherwise attainable. Under the guidance of a knowledgeable Tribunal mediator, the parties can collaborate on a solution to the problem, an option not available in the statutory inquiry process, at the end of which the Tribunal is required to either substantiate the complaint (and usually issue a remedial order) or otherwise dismiss the complaint.

Often the parties will agree that the mediated settlement should incorporate measurable targets and performance criteria designed to prevent a recurrence of the discrimination. In addition to addressing the personal interests of the parties in a given case, such settlements reach a wide constituency of employees or clients. Mediated remedies can include the adoption or revision of institutional policies on the accommodation of persons with disabilities, the prevention of harassment in the workplace, or the protection of human rights in general. Sometimes settlements include an undertaking reflecting a newly recognized acknowledgement by the respondent employer or service provider of the benefit of providing managers or front-line staff with training in human rights issues.

Tribunal Decisions

By far the most labour-intensive part of the Tribunal's work is conducting hearings and rendering decisions. In 2008, the Tribunal issued 17 written decisions substantiating or dismissing complaints. The full text of all decisions is available on the Tribunal's website. Since a sizable majority of the complaints received by the Canadian Human Rights Commission are resolved or dismissed by the Commission itself, and nearly a third of the complaints referred to the Tribunal are settled at mediation, cases that proceed to hearing generally present complexities of fact or law that are best addressed in a quasi-judicial hearing. Most of this year's hearings focused on fact-finding. That is to say, the parties had differing views on whether the events alleged to be discriminatory took place as alleged, or even if they took place at all. Thus it fell to the Tribunal to weigh conflicting evidence and assess credibility.

Although the activities that form the basis of a complaint generally have negative consequences for the complainant, not every instance or pattern of alleged harmful or annoying behaviour by a respondent is discrimination. In a society increasingly polarized on questions of cultural sensitivity and freedom of expression, it is useful for employers, service providers and the Canadian public in general to know whether

As well as addressing the personal interests of the parties in a given case, some mediated settlements incorporate measurable targets and performance criteria designed to protect a wider constituency of employees or clients.

a given activity is a discriminatory practice. In the case of *London v. New Brunswick Aboriginal Peoples Council et al.*, the Tribunal heard evidence of a supervisor's annoying and unprofessional behaviour toward an employee of Malisеet ancestry. The Tribunal found that the small number of occasional derisive remarks referencing the employee's race did not cross the line into harassment.

Another case decided this year required the Tribunal to hear conflicting evidence from a cadet trainee and his RCMP instructors. The Tribunal found the complainant's allegations substantiated. Apart from numerous instances of discriminatory differentiation, the Tribunal found that some instructors had filed clearly inaccurate performance reports, leading ultimately to the complainant's dismissal. Instructors who were found responsible for harassing the complainant had initiated the procedures for his termination. And, although the Tribunal found that the complainant was lacking in communication and decision-making skills, it held that the training environment had been so poisoned by harassment and discriminatory practices that this had probably been a factor in the complainant's failure to develop and demonstrate the required

Tahmourpour v. Royal Canadian Mounted Police

A Muslim Canadian of Iranian origin alleged that he had been subjected to discriminatory remarks, hostile treatment and verbal abuse by his instructors during the cadet training program. He claimed that his performance had been unfairly evaluated and his training contract terminated on false pretenses. Alleging that he was improperly designated as ineligible for re-enrollment in the training program after failing an evaluation, the complainant asserted that all the alleged conduct was based on his race, religion, and ethnic or national origin. The RCMP argued that the complainant's performance during the training was fairly evaluated, was found wanting, and that his contract was terminated simply because he failed to meet numerous standards.

Full text of decision
www.chrt-tcdp.gc.ca/search/view_html.asp?doid=897&lg=_e&isruling=0

Forward and Forward v. Canada

Citizenship and Immigration Canada rejected the applications of two American-born U.S. citizens claiming a right of Canadian citizenship through their mother, who became a naturalized Canadian citizen in 2001. The complainants, whose father was also a U.S. citizen, argued that their mother (the daughter of a Canadian mother and an American father) would have obtained Canadian citizenship at birth (and thus conferred it on them at their birth) but for a section of the 1947 *Citizenship Act* allowing fathers, but not mothers, to pass their citizenship to their children born abroad. The Tribunal reasoned that the complainants' mother, as the "primary target" of the sex-based discrimination mandated by the 1947 Act, might have been able to obtain a remedy, but her children could not. As the foreign-born children of a foreign-born child of a Canadian married woman, the complainants were not directly affected by the impugned legislation and thus would not have standing, unless they claimed a remedy for the benefit of the primary target of the legislation, i.e., their mother. In dismissing the complaint, the Tribunal also questioned whether the *Canadian Human Rights Act*, which came into force in 1978, could be invoked to retroactively alter the citizenship at birth of a woman born in 1955.

Full text of decision
www.chrt-tcdp.gc.ca/search/view_html.asp?doid=888&lg=_e&isruling=0

skills. The Tribunal ordered the RCMP to offer the complainant a chance to re-enroll in the next available training program and to provide him with a fair assessment. The Tribunal also ordered that the RCMP pay the complainant compensation for salary and benefits, pain and suffering, and willful and reckless discrimination. The RCMP has sought judicial review of the Tribunal's decision and the case is currently before the Federal Court.

Before the coming into force of the *Canadian Human Rights Act*, it was possible to argue that persons with disabilities, particularly significant disabilities, should be kept safely at home out of harm's way. Accessible public transit, curb cuts, Braille, information technology, telework arrangements, and a host of other accommodations have since done much to integrate persons with disabilities into the workplace. But although our understanding and acceptance of persons with physical disabilities is far greater than it was even a decade ago, fear and ignorance of mental disabilities, for example, often still abound.

This year the Tribunal heard a complaint brought by an autistic woman who argued that the ignorance and insensitivity of her colleagues and employer resulted in her adverse treatment and constituted discrimination. In *Dawson v. Canada Post Corporation*, the Tribunal had to decide whether the complainant had been discriminated against by Canada Post when coworkers spread rumours about her self-injury and about an alleged propensity to violence, and her employer ordered her to undergo a medical evaluation when she took a leave of absence because of the rumours.

The Tribunal concluded that Canada Post had failed to consider the emotional trauma that a compulsory medical evaluation might cause an autistic person. Such a person could be reasonably expected to be fearful of being examined by an unknown doctor, distrustful of a doctor chosen by the respondent, and reluctant to see a doctor who was not an autism specialist, but rather a practitioner who specialized in violent, criminal behaviour. The Tribunal found that Canada Post had failed to adequately accommodate the complainant's needs and also failed to provide a workplace free of discrimination and harassment. It ordered Canada Post to work with the Canadian Human Rights Commission to modify existing policies and to conduct workplace equity, accommodation and sensitivity training for managers and staff, notably in relation to autism and autistic individuals.

A small but significant number of the Tribunal's written decisions establish important legal precedents by providing detailed consideration of the meaning of one or more sections of the *Canadian Human Rights Act*. *Forward and Forward v. Canada (Citizenship and Immigration)* was one such case. The Act makes it a discriminatory practice to deny, or deny access to, any good, service, facility or accommodation customarily available to the public, or to differentiate adversely in the provision thereof, in relation to any individual on a prohibited ground of discrimination. Although terms such as *harass*, *undue hardship* and *differentiate adversely* have frequently been interpreted by the courts, few adjudicators or judges have had occasion to fully explore the meaning of services in the context of the Act. In its 2008 decision in *Forward and Forward*, the Tribunal discerned some limits on the concept of services, concluding that the granting of citizenship was not a service within the meaning of the Act and thus fell outside the ambit of its protections. Before this decision, it was arguable that any activity performed by federal government departments and agencies on behalf of Canadians was a service for the purposes of the Act. But the Tribunal decided that characterizing citizenship as a service would ignore the fundamental role that citizenship plays in defining the relationship between individuals and the state.

Sometimes a single Tribunal decision can instantly affect tens of thousands of people, as when the Tribunal orders a public sector employer to retroactively increase the wages of female-dominated occupational groups, the work of which has been undervalued compared with the work performed by male-dominated occupational groups in the same establishment. Although federal government departments have been subject to the *Canadian Human Rights Act* for three decades, they still sometimes adopt new policies that have the unintended effect of running afoul of the Act. A case in point was *Lavoie v. Treasury Board of Canada*, decided by the Tribunal in 2008. The Treasury Board of Canada is the legal employer of Canada's 380,000 federal public servants. Its new Term Employment Policy enables employees to convert their status from temporary to permanent (term to indeterminate) once they have accumulated three years of employment in the federal public service. However, unpaid absences (leaves) longer than 60 days do not count toward the cumulative three-year period. The complainant alleged that the new policy discriminated against women since they, alone, take maternity leave and since they have been more likely than men to avail themselves of maternity leave and parental leave; both types of leave normally exceed 60 consecutive days. Thus it was harder for female employees than for males to accumulate the three years of service required for conversion to permanent employee status.

The Tribunal agreed that the effect of the policy was disproportionately felt by women. In rejecting the respondent's argument that the policy was not reasonably necessary to give managers enough time to determine whether there was an ongoing need for the position in question, the Tribunal noted that absent incumbents were routinely replaced. It also observed that the policy did not exclude paid leaves from its cumulative service calculation, suggesting that attendance at the workplace was not always necessary to conducting the assessment. In substantiating the complaint, the Tribunal concluded that the respondent had not shown the flexibility and creativity necessary in this case, nor had it examined all the available options. The Tribunal ordered Treasury Board to amend its policies so that maternity and parental leaves counted as cumulative service. The decision will affect thousands of female term employees in the federal public service.

Recent years have seen numerous complaints against individuals and organizations who maintain Internet discussion forums dealing with political and social issues. Section 13 of the *Canadian Human Rights Act* prohibits the repeated communication of messages through an Internet site that would likely expose individuals to hatred or contempt on prohibited grounds of discrimination. Many of these websites contain material laden with ethnic/racial stereotyping, obscene and dehumanizing characterizations of groups identifiable on prohibited grounds, and exhortations to discriminate or commit violence. This year one respondent challenged the constitutionality of s. 13. While the challenge is pending, respondents in some new s. 13 complaints have agreed to mediation, while others remain opposed on the ground that the section violates the fundamental freedom of expression guaranteed in the *Canadian Charter of Rights and Freedoms*. One creative mediation session in 2008 afforded the parties an opportunity to rationally discuss the issue of free speech and exposure to hatred and contempt and to collaborate on changes to the impugned website that would preserve the respondent's free expression without crossing the line into discriminatory communication. In another mediated settlement, the respondent, on learning first-hand the effect that the respondent's website had had on the complainant, immediately removed the offending material.

Judicial Review by the Federal Court of Canada

This year the Federal Court and Federal Court of Appeal issued seven judgments relating to six Tribunal decisions. The Supreme Court of Canada dismissed an application for leave to appeal a decision of the Federal Court of Appeal, which had rejected a respondent's challenge to the Tribunal's jurisdiction. The case involved a member of Parliament who had distributed allegedly discriminatory literature to his constituents containing comments about Aboriginal people, and the respondent claimed that the principle of parliamentary privilege ousted the Tribunal's jurisdiction. The Supreme Court's decision to dismiss the application freed the Tribunal to inquire into the merits of the original complaints, now five years old.

Perhaps the most significant judicial review decision this year was the Federal Court judgment overturning the Tribunal's 2005 decision upholding a complaint of wage discrimination against Canada Post Corporation. In one of the longest running cases in its history, the Tribunal found that Canada Post had discriminated against certain of its female employees by paying its employees in the male-dominated postal operations group more than its employees in the female-dominated clerical and regulatory group for work of equal value. The Federal Court judgment overturning the Tribunal's decision has since been appealed to the Federal Court of Appeal.

All 2008 judicial review decisions can be found on the websites of the Courts that rendered them.

Judicial review decisions
www.chrt-tcdp.gc.ca/tribunal/index_e.asp

Tribunal Decisions and Membership

Tribunal Decisions and Rulings

The full text of all 22 decisions and 33 formal rulings on motions and objections rendered in 2008 can be found on the Tribunal's website.

www.chrt-tcdp.gc.ca/tribunal/index_e.asp

Judicial Review Decisions

FEDERAL COURT

Brown v. National Capital Commission, 2008 FC 733
Canada (Attorney General) v. Brown, 2008 FC 734
Mowat v. Canada (Canadian Armed Forces), 2008 FC 118
P.S.A.C. v. Canada Post Corporation, 2008 FC 223
Warman v. Tremaine, 2008 FC 1032

FEDERAL COURT OF APPEAL

Birkett v. Goodwin, 2008 FCA 127
Durrer v. Canadian Imperial Bank of Commerce, 2008 FCA 384

SUPREME COURT OF CANADA

Pankiw v. Dreaver et al., SCC Docket no. 32501; June 26, 2008

Members of the Tribunal

J. Grant Sinclair, Q.C., Chairperson
Athanasios D. Hadjis, Vice-Chairperson
Karen Jensen, Full-time Member

Part-time Members

Pierre Deschamps
Michel Doucet, Q.C.
Julie Lloyd
Kathleen Cahill
Matthew D. Garfield
Kerry-Lynne Findlay, Q.C.
Wallace G. Craig
Marc Guignard
Réjean Bélanger
Edward P. Lustig

Registry

Gregory M. Smith, Executive Director and Registrar